(12)

No. 782

Supreme Court of the United States

October Term, 1941

SALLIE ESSARY, Executrix of the Estate of
William H. Essary, Deceased,
Petitioner,

vs.

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, Trustees of the Estate of The Chicago, Rock Island & Pacific Railway Company, a corporation; AND C. [illegible] AND JOHN G. LONSDALE, Trustees of the Estate of [illegible] San Francisco Railway Company, a corporation,
Respondents.

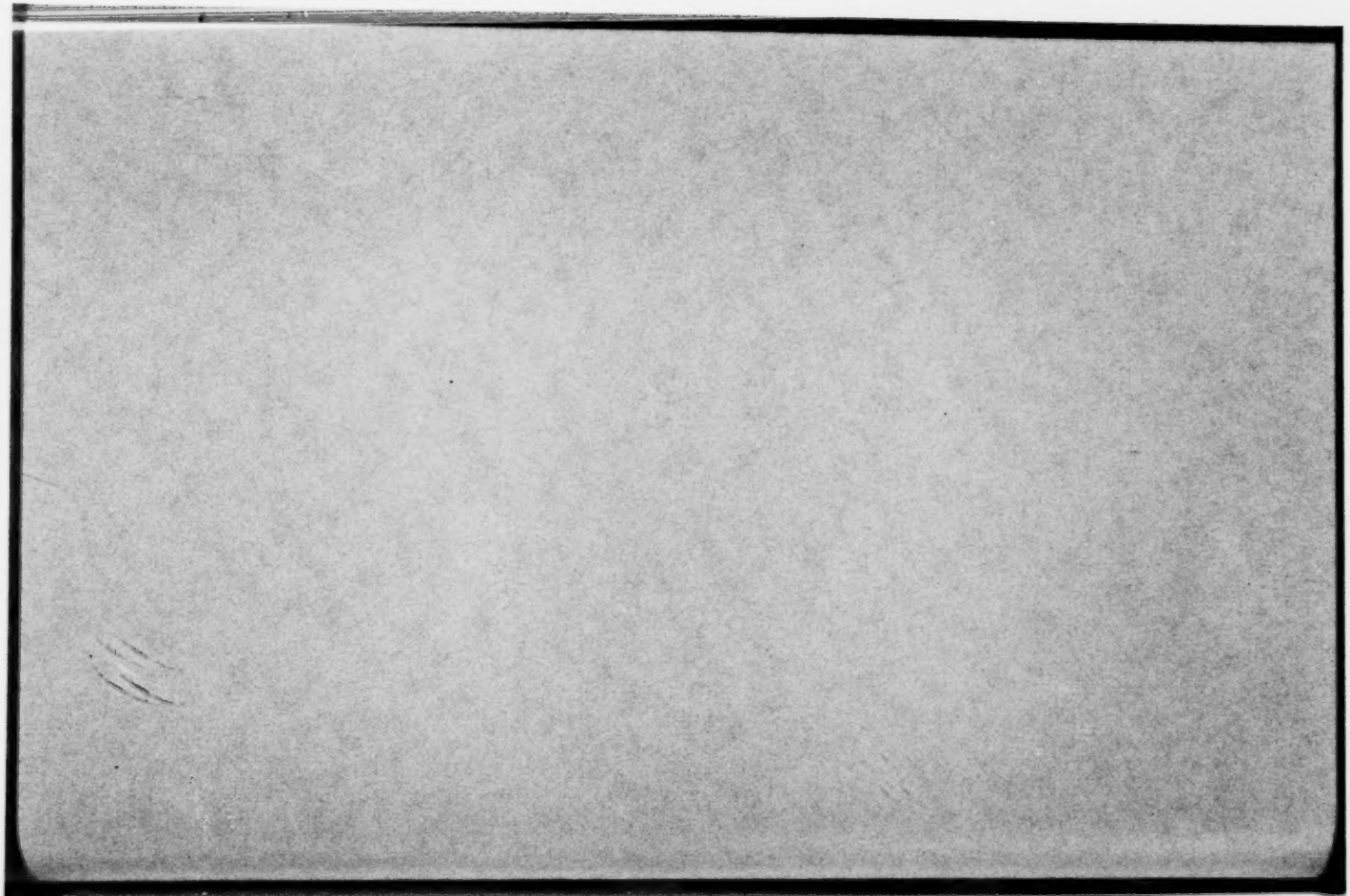
ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF RESPONDENTS IN OPPOSITION

M. L. Bell,
W. F. Pierce,
Thomas F. Lawrence,
W. R. Blakeney,
Robert E. Lee,

M. G. Bonner,
M. K. Cotton,
Counsel for Respondents.

OKLAHOMA LAW REPORT PUBLISHING CO., 40 N. ROBINSON, OKLAHOMA CITY



INDEX

Subject Index

	PAGE
Issues of Fact	2
Petitioner's Contentions Supporting Her Petition for Writ of Certiorari	3
Argument and Citation of Authorities	3
Instructions	9
Proximate Cause	12
Conclusion	15

Table of Cases

	PAGE
Baker et al. vs. Shaw, 184 Okl. 194, 86 Pac. (2d) 319	11
Blew, Administrator vs. Chicago, Rock Island and Pacific Railway Co., 177 Okl. 553, 61 Pac. (2d) 258	10
Chicago, M., St. P. & P. R. Co. v. Lineham, 66 Fed. (2d) 373	14
Chicago, R. I. & P. Ry. Company vs. Kahl, 168 Okl. 578, 35 Pac. (2d) 731	10
Chicago, Rock Island and Pacific Railway Company vs. Richerson, 185 Okl. 560, 94 Pac. (2d) 934	8
City of Bristow vs. Schmidt et al., 170 Okl. 338, 40 Pac. (2d) 656	12
Egan Chevrolet Co. v. Brunner, 102 Fed. (2d) 373	15
Firebaugh vs. Dubois, 70 Okl. 269, 173 Pac. 1126	12
Firestone Tire & Rubber Company vs. Sheets, 62 Pac. (2d) 91, 178 Okl. 191	8
General American Life Insurance Company v. Bryson, 61 Pac. (2d) 1094, 178 Okl. 142	8
Grayson et al. vs. Brown, 166 Okl. 43, 26 Pac. (2d) 204	10
Montgomery Ward & Co. v. Snuggins, 103 Fed. (2d) 458	15
National Life & Accident Insurance Company v. Ford, 169 Okl. 102, 36 Pac. (2d) 25	8

TABLE OF CASES (Continued)

PAGE

Pacific Mutual Life Insurance Company of California vs. Tetirick, 68 Pac. (2d) 828, 180 Okl. 307 8
Peters v. Wabash Ry. Co., 42 S. W. (2d) 588 14
Pitcairn v. Brandies, 87 Fed. (2d) 928; cert. den. 301 U. S. 706, 81 L. ed. 1460, 57 S. Ct. 939 15
Skaggs v. Gypsy Oil Co., 169 Okl. 209, 36 Pac. (2d) 865 10
Southern Pac. Co. v. Ralston, 67 Fed. (2d) 958 ..... 14, 15
St. Louis-San Francisco Ry. Co. vs. Stuart, 173 Okl. 221, 47 Pac. (2d) 177 10
Vigor v. Chesapeake & O. Ry. Co., 101 Fed. (2d) 865 13

Table of Statutes and Texts

PAGE

U.S.C.A., Title 45, Section 2 3
U.S.C.A., Title 45, Section 51, Notes 333 and 334 13

Supreme Court of the United States

October Term, 1941

No. 792

SALLIE ESSARY, Executrix of the Estate of William H. Essary, Deceased,
Petitioner,

vs.

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a corporation; AND J. M. KURN AND JOHN G. LONSDALE, Trustees of the Estate of St. Louis-San Francisco Railway Company, a corporation,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF RESPONDENTS IN OPPOSITION

This is respondents brief opposing the petition of the petitioner for writ of certiorari directed to the Supreme Court of the State of Oklahoma to bring before the Supreme Court for review the above entitled cause.

The pleadings are contained in the Transcript at Pages 1-26, thereof.

ISSUES OF FACT

The negligence alleged by plaintiff is set out in two causes of action. Her first cause of action alleges that defendants' negligence consists of the violation of the Safety Appliance Act of the Congress of the United States in that the automatic coupler which was used to cut off these four cars was defective and would not work, and that the defective condition of the coupler was the proximate cause of the injury.

In the second count of the petition the plaintiff alleges that the other members of the train crew were guilty of negligence in the handling of the train; that the train crew, including the engineer, caused said train while traveling in a backward movement to be jerked in such a violent manner that the deceased was thrown from the top of the train to the ground between the rails and said cars were allowed to run upon and over him, causing his immediate death.

The answers of the defendants consist of a general denial and defendants further plead contributory negligence and assumption of risk.

All of these issues were duly submitted to the jury upon the evidence and a general verdict in favor of the defendants and against the plaintiff was returned.

The plaintiff appealed to the Supreme Court of Oklahoma and the verdict and judgment of the trial court was affirmed. The opinion of that court is set out at Pages 208-212 of the Transcript.

PETITIONER'S CONTENTIONS SUPPORTING HER PETITION FOR WRIT OF CERTIORARI

While the petition for a writ of certiorari for review contains the citation of numerous authorities and statements, an analysis of such petition shows that counsel for petitioner urges only two propositions, to-wit:

1. That there is no evidence to support the verdict of the jury and the judgment of the trial court and the Supreme Court of Oklahoma thereon.

2. That the trial court erred in his instructions to the jury.

ARGUMENT AND CITATION OF AUTHORITIES

The burden of proof of negligence of defendants rested upon the plaintiff. The plaintiff alleged in Count 1 of her petition that the defendants violated Section 2, Title 45, *U.S.C.A.*, which reads as follows:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

There was no evidence whatever to support the charge that defendants violated this Section of the Safety Appliance Act. The only witness interrogated by plaintiff concerning the coupler was E. E. Morgan, switch foreman. He testified to no defects in this coupler at all. His testimony begins in the Transcript at Page 60 (Original Record at Page 94). At Page 65 of the Transcript he described to the jury what kind of a coupler he was using; that it was a

Major coupler and was so constructed that it complied with the Safety Appliance Act. It coupled by impact with the car and uncoupled without the necessity of men going between the ends of the cars. He testified that the string of cars were barely moving; that it was a standard automatic coupler that had been approved by the Safety Commission of the Railway Company and the Interstate Commerce Commission. It did not require that the switchmen and brakemen go between the ends of the cars to couple it and plaintiff offered no testimony that this coupler was unsafe or defective in any way; that when E. E. Morgan made his first attempt to pull the pin with the pin lifter the train had run out of slack; that this was due to the fact that the train was on a small grade and it had by its own gravity straightened out the slack. He got hold of the pin lifter with his hand and discovered that the slack was out and the running out of the slack had tightened the pins in all of the train; that he signaled the engineer to give him a little slack and he used his foot and immediately uncoupled the four cars; that the place where Morgan was standing on the ground opposite where the uncoupling was made was a little slanting and at that particular point he could not get enough leverage to pull the pin out without the slack.

Loyd P. Wilson testified, beginning at Page 154 of the Transcript, that this coupler was an American Railway Association type of coupler; that it is the type adopted by all of the railroads in the country and that he inspected it soon after the accident and found no defects about it.

The testimony given by these two witnesses is not even controverted.

On November 9, 1937, the date of the accident, plaintiff's witness, E. J. Robertson, made a statement in writing which appears at Page 135 of the Transcript (Page 202 Original Record). He signed that statement and included in it is the following:

> "The cut of cars went on down the main line to the curve before coming to a stop. I am positive that the cut had already been made when I saw this man fall and that there was a lap of about a car length between this cut of cars and the rest of the cars that the engine had ahold of. The engine and the rest of the other cars were standing still when this man fell. At the time this man fell the cut of cars was going about 5 miles an hour or possibly a little slower. I never did look over the cars to examine them.
>
> "The track at this point is a single line, straight in each direction for several hundred feet, running north and south, and down grade to the north. None of the other men who were standing on the platform or at that end of the compress saw this man fall and did not know anything of it until I told Richard about it and he then told the rest of them. (fol. 210) There was a slow continual rain at the time of the accident. Mr. Essary had on a long heavy rain coat, heavy gum boots, and it seems to me that because of the rain and the gum boots, he slipped while trying to put the brakes on. I had on gum boots at the time and I know that it was hard to walk with them on.
>
> "I am positive that I saw this man fall from the top of this front car and I am also positive that there was a gap of about a car length between the cut he was on and the rest of the cars that the engine had ahold of which had stopped at the time of the accident. I think that I am the only person that saw the accident. It seemed to me that all the movements of the engine and the cars just before the (135) accident were easy, there being no rough handling that I could tell." (136)

At the trial several months later Robertson tried to deny signing this statement and make the impression on the jury that he did not know whether or not the cut of four cars were disconnected from the rest of the train at the time the accident occurred. His testimony at the trial on that point appears at Page 33 of the Transcript (Page 53 Original Record). The evidence conclusively shows by the following witnesses that he did sign it:

G. K. McLaughlin, whose testimony begins at Page 130 of the Transcript (Page 196 Original Record).

E. D. Wallace at Page 152 of the Transcript (Page 227 Original Record).

L. G. Henderson at Page 146 of the Transcript (Page 219 Original Record).

The deceased's connection with this coupler was merely an incident to the switch movement. The deceased did not couple or uncouple the cars. Morgan did that. The deceased, Essary, climbed on top of this cut of four cars clumsily dressed in two pair of pants, boots, jersey sweater, overcoat and a raincoat over his overcoat. Plaintiff offered no evidence that the deceased was on top of the cars when Morgan made the cut.

Also plaintiff offered no evidence even tending to show that there was any rough handling of the train of cars by the train crew in this switch movement. The members of the train crew testified that they were barely moving the train and the slack ran out and that nothing occurred that was unusual in this movement. This testimony of the train crew is not contradicted.

Frank Fast, the engineer on this switch movement, testified at Page 178 of the Transcript (Page 264 Original Record):

"Q. State whether or not in making that movement there, there was any jerking or jumping of these cars with the engine?

A. None at all."

W. T. Snowden, fireman, at Page 172 of the Transcript (256 Original Record) in testifying about the movement of the train was asked:

"Q. Just tell what you did—what was done?

A. We made the first stop, then we back up about, I judge, about six feet and he made the cut. (173)

Q. State whether or not there was any jerk there in that movement?

A. No, sir, there was no jerking at all."

R. W. Boone, agent for the Railway Companies at Clinton, testified that he appeared at the scene of the accident soon after it happened and he was asked:

"Q. Did you have occasion to observe how Mr. Essary was dressed that afternoon as he was working?

A. Yes, sir, he had on two pair of pants, a pair of boots, a shirt and I would say a kind of a jersey sweater, a leather coat and a rain coat.

Q. Have a rain coat on?

A. Yes, sir.

Q. Over his leather coat?

A. Yes, sir, a rubber raincoat."

His testimony on that point is on Page 158 of the Transcript (236 Original Record).

None of the next above testimony was denied or in any way contradicted.

This was a general verdict for defendants. A general verdict finds every material fact in favor of the prevailing party. In the case of *Chicago, Rock Island and Pacific Railway Company* vs. *Richerson*, 185 Okl. 560, 94 Pac. (2d) 934, it is held:

> "A general verdict in favor of the plaintiff and against the defendant was a finding of every material fact necessary to support the general verdict."

And further the Supreme Court of Oklahoma holds:

> "A general verdict finds every material and issuable fact in favor of the prevailing party."

In the case of *National Life & Accident Insurance Company* v. *Ford*, 169 Okl. 102, 36 Pac. (2d) 25, the court held:

> "A judgment based on the verdict of a jury in a law action will not be disturbed by this court on appeal if there is any competent evidence reasonably tending to support the same."

Petitioner's contention that the verdict and judgment are not supported by the evidence is without merit. No witness testified that there was any defect in this coupler, nor that there was any jerking or rough handling of the train at the time of the accident.

A jury verdict will not be disturbed on appeal where there is any evidence reasonably tending to support it. *General American Life Insurance Company* v. *Bryson*, 61 Pac. (2d) 1094, 178 Okl. 142; *Firestone Tire & Rubber Company* vs. *Sheets*, 62 Pac. (2d) 91, 178 Okl. 191; *Pacific Mutual Life Insurance Company of California* vs. *Tetirick*, 68 Pac. (2d) 828, 180 Okl. 307.

INSTRUCTIONS

Petitioner's second contention is that the court committed reversible error in his instructions given to the jury at the trial. The court's instructions appear in full, beginning at Page 185 of the Transcript (Page 282 Original Record). These instructions adequately cover the general issues of the case as to negligence. The jury was also advised that it is alleged that the defendants violated the Safety Appliance Act and the provisions of the Federal Employers' Liability Act of Congress, including the provisions of said Acts with reference to the doctrine of contributory negligence and assumption of risk. Instructions Nos. 22, 23 and 24. Instruction No. 22, among other things contains this provision:

> "Neither contributory negligence nor assumption of risk may be interposed as a defense where an injury is occasioned or proximately caused by a violation of the 'Safety Appliance Act.'"

Instruction No. 23 contains a sentence—

> "* * * A failure of the appliance to work efficiently when properly operated will sustain a charge that the Act has been violated, and render the carrier liable for an injury which results from such failure." (289)

And Instruction No. 24 reads as follows:

> "You are instructed that if you find from the evidence that the coupler failed to work when attempted to be operated by the engine foreman by use of the hand on the lever at the side of the car, for the purpose of uncoupling the cars, and that such failure contributed in whole or in part to cause the death of the deceased, the defendants would be liable in damages." (290)

There was no attempt in these instructions to eliminate the application of the Federal Employers' Liability and

Safety Appliance Acts from the case. The meaning and effect of those Acts was plainly expressed and dealt with in these instructions.

In the case of *Blew, Administrator* vs. *Chicago, Rock Island and Pacific Railway Company*, 177 Okl. 553, 61 Pac. (2d) 258, it is held:

> "Instructions must be considered together, and while an instruction standing alone may be subject to criticism, yet if the instructions when taken in their entirety fairly submit the issues to the jury, reversible error is not committed."

See also—

Grayson et al. vs. *Brown*, 166 Okl. 43, 26 Pac. (2d) 204.

Chicago, R. I. & P. Ry. Company vs. *Kahl*, 168 Okl. 578, 35 Pac. (2d) 731.

St. Louis-San Francisco Ry. Co. vs. *Stuart*, 173 Okl. 221, 47 Pac. (2d) 177.

Skaggs v. *Gypsy Oil Co.*, 169 Okl. 209, 36 Pac. (2d) 865.

At the trial the plaintiff only excepted to Instructions numbered 10, 17, 19, 26 and 27 and only presented in argument to the trial court and the Supreme Court of Oklahoma Instructions numbered 10, 17 and 19. Instructions numbered 26 and 27 were both in plaintiff's favor and were not presented. Counsel for plaintiff took no exceptions to Instructions numbered 8, 9, 11, 12, 13, 14, 15, 16, 18 and 21. He has attacked all of those instructions and took no exceptions to them at the trial, or in his motion for a new trial. His motion for a new trial appears at Page 201 of the Transcript (Page 301 Original Record).

At Page 17 of the petition for writ of certiorari counsel for petitioner with reference to the local rules of practice

and procedure in the Oklahoma State courts makes the following statement:

> "While this case was based upon Federal Statutes it was triable under the local rules of practice and procedure in the State courts, C. & O. R. Co. v. De Atley, 241 U. S. 310, 36 S. Ct. 564, 60 L. Ed. 1016, Central Vt. R. Co. v. White, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433, hence the laws of the State of Oklahoma govern in regard to the necessity for and manner of saving exceptions and in the matter of motions for new trial."

We accept his statement in regard to the necessity for and manner of saving exceptions and motions for new trial in State courts in cases otherwise based on Federal statutes. In this connection we call the Court's attention to the fact that the three instructions to which he did except comprise a very small part of the instructions of the court as a whole and these instructions to which he took no exceptions contain all of the vital parts of the instructions as a whole.

It is well settled by rules of practice and procedure and laws of Oklahoma that where a party fails to object to the instructions at the trial of a cause he thereby waives all error. While we do not think these instructions contain any reversible errors, we assert that if there were any errors in these instructions to which plaintiff made no objection in the trial court it has been waived by the plaintiff. In support of this proposition we submit the following authorities:

In the case of *Baker et al.* vs. *Shaw*, 184 Okl. 194, 86 Pac. (2d) 319, it is held: (2d Syl. by Court)

> "The purpose of an exception to an instruction to the jury is to inform the trial judge that it is error to give the same to the jury; and an exception to an in-

struction after the verdict has been returned comes too late."

In the *City of Bristow* vs. *Schmidt et al.*, 170 Okl. 338, 40 Pac. (2d) 656, it is held: (3d Syl. by Court)

"Error cannot be predicated on trial court's rulings on instructions, where rulings were not excepted to at time made."

The case of *Firebaugh* vs. *Dubois*, 70 Okl. 269, 173 Pac. 1126, holds: (1st Syl.)

"This court will not review an instruction given on the trial of a cause, unless the instruction is excepted to at the time it is given."

PROXIMATE CAUSE

The court instructed the jury in instruction No. 9 with reference to the proximate cause of the accident, as follows:

"You are further instructed that it is admitted and stipulated by both parties to this suit that at the time of the accident complained of, the switch engine and crew were engaged in the movement of interstate traffic. By what is known and designated as the 'Safety Appliance Act,' the laws of the United States require that railroads engaged in interstate commerce must have all of their cars equipped with automatic couplers which can be coupled and uncoupled by means of the use of a lever at the side of the cars, without going between the cars.

"If you find from a preponderance of the testimony that the defendants had in use and were switching and hauling a car with an automatic coupler that was defective and out of repair at and immediately prior to the time of the accident, and that the defective condition of such automatic coupler was the contributing proximate cause of the accident and to the death of the deceased, your verdict will be for the plaintiff.

"And before you can return a verdict for the plaintiff based on the allegation that the automatic coupler was defective and out of repair, you must be satisfied by a preponderance of the testimony not only that the automatic coupler was defective or out of repair, but that its defective condition was the direct or proximate contributing cause of the accident as the court has defined that term to you."

No exception was taken by plaintiff to this instruction.

It is well settled that under the provisions of the Federal Employers' Liability Act the violation of the Safety Appliance Act with reference to automatic couplers is not actionable unless the injuries were proximately caused or contributed to by the defective and unworkable condition of the coupler.

The authorities cited in Notes 333 and 334, Section 51, Title 45, *U.S.C.A.*, hold that to recover from a railway company, under the Safety Appliance Act requiring automatic car couplers, for death of an employee, the injuries must have been proximately caused by failure of such coupler. In other words, these cases hold that the proximate contributing cause is one of the necessary elements to establish negligence, and that it applies under the Federal Employers' Liability Act and the Safety Appliance Act in the same way that it applies to common law actions in tort.

In the case of *Vigor* v. *Chesapeake & O. Ry. Co.*, 101 Fed. (2d) 865, the United States Circuit Court of Appeals, Seventh Circuit, holds (1st Syl.):

"To recover from railway company under section of Safety Appliance Act requiring automatic car couplers, for death of freight train brakeman as result of engine tender separating from first car, injuries must

have been proximately caused by failure of such car and tender to couple automatically or impossibility of uncoupling them without going between them. Safety Appliance Act, Section 2, 45 U.S.C.A., Sec. 2."

In the case of *Southern Pac. Co.* v. *Ralston*, 67 Fed. (2d) 958, it is stated in the 2nd and 5th paragraphs of the syllabus, as follows:

"Proximate cause and causation under statute are questions of fact and should not be withdrawn from jury if reasonable men might reach different conclusions from evidence (Federal Employers' Liability Act, Sec. 1 [45 U.S.C.A., Sec. 51]).

* * * * * * * * * * * *

"Whether failure of brakeman to step off locomotive tender when fireman disregarded signal to stop at crossing was sole cause of brakeman's injury in crossing collision with automobile, or whether it contributed to injury, and whether brakeman assumed risk held for jury (Federal Employers' Liability Act, Sec. 1 [45 U.S.C.A., Sec.51])."

In the case of *Chicago, M., St. P. & P. R. Co.* v. *Lineham*, 66 Fed. (2d) 373, the United States Circuit Court of Appeals, Eighth Circuit, lays down the rule on proximate cause in a case of this kind:

"Employer's failure to obey Safety Appliance Act must be proximate cause of injury to employee for latter to recover damages therefor."

In the case of *Peters* v. *Wabash Ry. Co.*, 42 S. W. (2d) 588, the Supreme Court of Missouri, held (4th Syl.):

"Defective coupling must have caused or contributed to cause employee's injury, and not merely have furnished occasion for employee's going into place where injured, in order to make employer liable (Federal Employers' Liability Act, [45 U.S.C.A., Sections

51-59]; Federal Safety Appliance Act, Sec. 2, [45 U.S.C.A., Sec. 2])."

It is only where, under the evidence, reasonable minds could draw but one conclusion that the question of proximate cause ever becomes a question of law. See, *Montgomery Ward & Co.* v. *Snuggins*, 103 Fed. (2d) 458; *Egan Chevrolet Co.* v. *Brunner*, 102 Fed. (2d) 373, l. c. 377; *Pitcairn* v. *Brandies*, 87 Fed. (2d) 928, l. c. 929; cert. den. 301 U. S. 706, 81 L. ed. 1460, 57 S. Ct. 939; see also *So. Pac.* v. *Ralston*, 62 Fed. (2d) 1026, 67 Fed. (2d) 958.

In this case the trial court properly instructed the jury as to the proximate cause of the accident. Under the evidence in this case the court was compelled to instruct on this point. The plaintiff did not object to these instructions, nor did counsel for plaintiff move at any stage in the case for a directed verdict in favor of the plaintiff. Plaintiff did not request the court to give any instructions at all, except a brief instruction on contributory negligence which was covered by the court in another instruction.

The defendants at the close of all testimony requested a directed verdict for defendants but the request was denied.

CONCLUSION

There was no violation of the Safety Appliance Act in connection with the coupler that was used in uncoupling the 4 empty cars from the remainder of the train. This was a standard automatic coupler that had been approved by the Safety Officials of the Railway Company and the Interstate Commerce Commission. It is admitted that it was of standard make and use. It did not require that switchmen

or brakemen go between the ends of the cars to couple or uncouple it, and no one was between the cars when this uncoupling was made. The uncoupling was accomplished by E. E. Morgan, the Switch Foreman, from a position opposite the space between the two cars where the coupler was located. Attached to this coupler is a steel rod that extends out from between the cars called a pin lifter. A train man can either lift the coupling pin with this pin lifter by standing on the ground outside the opening between the ends of the cars and pull the pin by placing his hand upon the projecting pin lifter rod, or by catching hold of the grab iron and putting his left foot in the stirrup on the outside of the car at the end and pushing down on the end of the pin lifter rod with his right foot. It is done either way. In neither way is the operator of the coupler between the ends of the cars. In this case when Morgan made his first attempt to pull the coupling pin with the pin lifter the train had run out of slack. That was due to the fact that the train was on a small grade and it had by its own gravity stretched out the slack. He got hold of the pin lifter with his hand and discovered the slack was out and the running out of the slack had tightened the pins in all of the couplers in the train. The train was barely moving. He signaled the engineer to give him a little slack and immediately used his foot and easily uncoupled the 4 cars immediately. The place where Morgan was standing on the ground opposite where the uncoupling was made was a little slanting and at that particular point he could not get enough leverage to pull the pin out without the slack. In fact he could not have performed this uncoupling with his hand or foot if he had not got the slack. There was nothing unusual about

the movement of the train, or the uncoupling. A similar uncoupling takes place in those yards every day. This coupler safely performs the use that it performed at that time and there is no evidence whatever that it failed to work at any time. The evidence is that it was in safe condition and no evidence that it was ever defective. The deceased's connection with this coupler was merely an incident to the switching movement. The deceased did not couple or uncouple the cars. Morgan did that.

The deceased, Essary, climbed on top of this cut of four cars after they were cut off of the train. He was not on top of them when Morgan pulled the pin. These four cars had rolled a short distance before Essary got on top of them. In the first place there was nothing wrong with the coupler, and in the second place, its alleged condition in nowise affected him. Plaintiff's assertion that defendants violated the Safety Appliance Act in connection with this coupler is simply a frantic effort to try to find some negligence of defendants in this case. Plaintiff's allegations as to the coupler are contained in Count 1 of her petition.

In Count 2 plaintiff complains that deceased's death was caused by the negligence of the train crew in violently jerking and handling the engine and the rest of the train in switching. There is no evidence at all as to negligence of that kind.

There is absolutely no merit in her Count 1 or Count 2. From the very date of this accident the plaintiff has made a diligent search to find negligence on the part of the defendants. All these efforts failed. The amazing thing about the attack on the instructions is that out of all of these instructions the plaintiff at the trial excepted to only five.

There was no error at the trial. The suit is an ordinary action brought under the Federal Employers' Liability Act by a railroad employee for damages alleged to have been caused by the negligence of the defendants in that they failed to furnish a safe coupler, and that the other members of the train crew were guilty of negligence in handling the switching movement. There is nothing unusual about the case insofar as the Federal Acts are concerned. The filing and prosecution of the suit is authorized by Section 51, Title 45, U.S.C.A. The defense of contributory negligence of the plaintiff's decedent is provided for in Section 53 of the same Act. The doctrine of assumption of risk is available to defendants in Section 54 of the same Act. This case was filed and prosecuted under this Act with due regard to the provisions of the Safety Appliance Act contained in Section 2, Title 45, U.S.C.A. All phases of the Safety Appliance Act and the Federal Employers' Liability Act were fully covered in the court's instructions. When those instructions are considered as a whole, and they must be, there is no error therein. The jury returned a general verdict in favor of the defendants. They were instructed in Instruction No. 25 that in case they found for the defendants under the evidence and these instructions their verdict will simply be "We find for the defendants." The plaintiff took no exceptions, nor made any objections to that instruction. This general verdict is a determination in favor of defendants on every litigable issue in this case. It is sustained by the evidence. It is not contrary to law. The effect of the plaintiff's claim is that the court should not have instructed anything at all, except a direction to the jury to return a judgment for the plaintiff. Plaintiff objects to

the instruction concerning contributory negligence and assumption of risk. These defenses were pleaded. No effort was ever made to strike them from the files. The case was tried. The evidence shows that the facts were abundant showing that the deceased assumed the risk and was guilty of contributory negligence. It is well settled that the deceased assumed the customary and ordinary risks of his employment. In this case Mr. Essary was 54 years old at the time of the accident. He climbed on top of this cut of cars dressed in two pair of pants, pair boots, a jersey sweater, an overcoat and a raincoat over his overcoat. Needless to say he was dressed in a bunglesome way. He climbed up the steps and walked to the front end of the front car that was in the cut of cars. No one could say that that kind of employment is not a usual and customary risk and hazard. He assumed those customary and usual risks and hazards in this case. There was no error in these instructions. There was no evidence of any negligence on the part of the defendants, either as to the coupler, or the conduct of the train crew.

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

M. L. Bell,
W. F. Peter,
Thomas P. Littlepage,
W. R. Bleakmore,
Robert E. Lee,

M. G. Roberts,
M. K. Cruce,

Counsel for Respondents.

REPLY BRIEF

(13)

FILED
JAN 9 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. 792.

SALLIE ESSARY, Executrix of the Estate of William H. Essary, Deceased, *Petitioner,*

VS.

FRANK O. LOWDEN, JAMES E. GORMAN, and JOSEPH B. FLEMING, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a Corporation; and J. M. KURN and JOHN G. LONSDALE, Trustees of the Estate of St. Louis-San Francisco Railway Company, a Corporation, *Respondents.*

REPLY BRIEF OF PETITIONER.

CLARENCE C. CHILCOTT,
918 Scarritt Building,
Kansas City, Missouri,
Counsel for Petitioner

INDEX.

Subject Index.

Summary of Argument..... 1

Argument. 3

Misstatements of the Evidence and Erroneous Conclusions of Respondents..... 4

Conclusion. 26

Table of Cases.

A. C. R. Co. vs. Parker, 242 U. S. 56, 59, 37 S. Ct. 69, l. c. 70, 61 L. Ed. 150..... 8

Atlantic Coast Line R. Co. vs. Mims, 242 U. S. 532, 37 S. Ct. 188, l. c. 189..... 13

Baker, Earl W., & Co. vs. City of Hollis, 36 Pac. (2d) 757, l. c. 760..... 22

Baker vs. J. H. Hudson Drilling Co., 300 Pac. 386, l. c. 388..... 11

Baumgart vs. Bryant, et al., 184 Okl. 531, 88 P. (2d) 635, l. c. 637, 638..... 19

Beck vs. Day, 62 Pac. (2d) 1014, l. c. 1015..... 22

City of Altus vs. Martin, 94 Pac. (2d) 1..... 22

C. & O. R. Co. vs. John J. De Atley, 241 U. S. 310, 36 S. Ct. 564, l. c. 566..... 26

C. R. I. & P. vs. Ward, 68 Okla. 201, 225 U. S. 18, 40 S. Ct. 275, 64 L. ed. 430..... 6

Evans vs. Local Bldg. & Loan Assn., 36 Pac. (2d) 895 (Okla. Sup. Ct.)..... 12

First National Bank of Mounds vs. Cox, 83 Okla. 1.. 15

Green Const. Co. vs. Empire District Elec. Co., 218 Pac. 1074, l. c. 1075 25

Gulf M. & N. Ry. Co. vs. Wells, 275 U. S. 455, 48 S. Ct. 151, 72 L. ed. 370 9

Helsel vs. Fletcher, 98 Okla. 285, 225 Pac. 514 24

Liberty Nat. Bank of Weatherford vs. Semkoff, 84 Pac. (2d) 438 23

Martin vs. McCune, 170 Okl. 196, 39 P. (2d) 978 22

Mason vs. McNeal, ... Okla. ...., 100 Pac. (2d) 451, l. c. 452, 453 19

Miller Bros. vs. McCall Co., 133 Pac. 183 25

Miller vs. Price, 33 Pac. (2d) 625 25

Payne vs. Harvester Machine Co., 11 Okla. 318, 66 Pac. 287. 24

Riser, et al. vs. Herr, 102 Pac. (2d) 178, l. c. 180 23

Southern Ry. Co. vs. Maggie Gray, 241 U. S. 333, 36 S. Ct. 558, l. c. 560, 60 L. ed. 1030 12

Snyder vs. Stribling, 18 Okla. 168 16

St. Louis S. F. & Texas R. Co. vs. Seal, 229 U. S. 156, 33 S. Ct. 651, l. c. 652 13

Toledo, St. L. & W. R. Co. vs. Slavin, 236 U. S. 454, 35 S. Ct. 306, l. c. 307 13

Williams vs. Otis, 155 Okla. 173 17

Winn, et al. vs. Corey, 179 Okl. 305, 65 Pac. (2d) 522, l. c. 524 25

Younger vs. Blanchard Hardware Co., 120 Okla. 279 17

Textbooks.

64 C. J. 957 14

20 R. C. L., Sec. 53, page 270 15

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. 792.

SALLIE ESSARY, Executrix of the Estate of William H. Essary, Deceased, *Petitioner,*

VS.

FRANK O. LOWDEN, JAMES E. GORMAN, and JOSEPH B. FLEMING, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a Corporation; and J. M. KURN and JOHN G. LONSDALE, Trustees of the Estate of St. Louis-San Francisco Railway Company, a Corporation, *Respondents.*

REPLY BRIEF OF PETITIONER.

SUMMARY OF ARGUMENT.

I.

Respondents state erroneous conclusions, drawn from the evidence, as matters of fact (Abs. p. 4).

II.

Petitioner does not claim there was no evidence to support the verdict but seeks a reversal of the judgment of affirmance by the Supreme Court of Oklahoma because the Supreme Court of Oklahoma erroneously held that there was no necessity to review the instructions because the evidence was wholly insufficient to support a verdict for petitioner.

III.

The evidence referred to in respondents' brief on pages 5 and 6 was impeachment and not substantive evidence and, therefore, a verdict for defendant could not be predicated thereon.

IV.

It is not necessary under the law of the State of Oklahoma to save exceptions to instructions which are fundamentally erroneous.

V.

The respondents evaded the issue in their discussion of the question of proximate cause.

ARGUMENT.

I.

The brief of respondents is merely a most partisan dissertation of "glittering" generalities appertaining to the Federal Safety Appliance and Federal Employers' Liability Acts, with no attempt to apply the principles of those acts to the facts in this case, colored somewhat by a short discussion of the conclusions of respondents as to what the effect of the evidence was, which conclusions are either inadvertently or deliberately distorted.

Not a single complaint is made that petitioner did not truly and accurately set forth the facts in her statement with record page references, and, by their failure to complain thereof, respondents admit the truth of said statement but blandly seek to avoid the effect thereof by setting forth an alleged admittedly *ex parte* statement obtained by a claim agent of respondents Lowden, et al., with the assistance of two other employees of said respondents (who were probably present so that the three could outswear the negro), from a weak and ignorant negro W. P. A. laborer (R. 29, 47, 55, 56, 57, 66, 67, 94, 226), said statement not being in the witness' language but consisting of the conclusions of the claim agent put in narrative form (R. 138, 142). The claim agent attempted to, and we believe he actually did, dictate the verbiage of the statement (R. 55).

The technique of the claim agent was to gradually lead the witness from fact to fiction by interspersing true statements as given him by the witness with figments of his own imagination concerning the same (R. 56), a practice among claim agents with which every experienced practitioner is familiar.

The witness was able to read some of the statement but some of it he could not make out and while he was laboring to decipher it he was being urged by the claim agent to sign without reading it by being informed that the claim agent had put it down like the witness said it; that he, the claim agent, was in a hurry to leave, and for the witness to sign the statement as "I have put down what you said." The claim agent said, "I put down what you said. I am in a hurry, trying to catch a train back to Oklahoma City" * * * and it was very near time for it, and the witness signed the statement without further attempting to read it (R. 56, 57, 58).

Misstatements of the Evidence and Erroneous Conclusions of Respondents.

We first desire to call to the court's attention the misstatements of the evidence and erroneous conclusions appearing in the brief of respondents. For instance, on page 6 thereof, they state:

> "Plaintiff offered no evidence that the deceased was on top of the cars when Morgan made the cut."

However, respondents in the same paragraph of their brief concede that decedent climbed on top of the cars, and petitioner calls the court's attention to the following bits of testimony from Morgan, the switch foreman, to-wit: After they had coupled on to the four cars and pulled them out from the compress switch track, both he and Essary dropped off at the switch and the end of the car stopped about 15 feet past the switch, where Morgan asked Essary if he could "hold them" and Essary said he could ride them and brake them (R. 62, 166). Morgan testified it was Essary's duty to get on

top of the cars and brake them (R. 75) and in the usual and customary way of performing his duties he would have gone on top of them and Morgan knew that under his instructions to Essary and under his line of duty it was Essary's place to be on top of the cars (R. 75, 169).

Of course, no litigant is required to prove all his case by one witness, or by every witness, but Morgan's testimony showed quite conclusively that in the usual, ordinary and customary manner of performing his work Essary would be on top of the car, and the testimony of other witnesses conclusively proved that fact and that he fell from the car (R. 31, 32, 50, 51, 157, 158).

As another instance of the unfairness of respondents in stating the effect of the testimony, we call the court's attention again to page 4 in which the remarkable statement is made in regard to Morgan's testimony:

> "When E. E. Morgan made his first attempt to pull the pin with the pinlifter the train had run out of slack; that this was due to the fact that the train was on a small grade and it had by its own gravity straightened out the slack. He got hold of the pinlifter with his hand and discovered that the slack was out and the running out of the slack had tightened the pins in all of the train."

Significantly no reference is made to the specific record page where this evidence is found, in violation of paragraph 3 of Rule 27 of this court.

No such statement was made. Respondents by the above paragraph have combined slight fact with much fiction as the record will bear witness (R. 63, 67, 71, 75, 76 to 78, inclusive, and pages R. 82 and R. 167.) Morgan was

an hostile witness it was necessary for petitioner to put upon the stand and his efforts to carry water upon both shoulders and avoid the Scylla of a violation of the Safety Appliance Act upon the one hand and the Charybdis of negligence in the operation of the coupler upon the other, necessitated a feat in verbal gymnastics beyond his capacity. He did everything he could to help respondents. He testified both ways at the same time by stating his conclusion to what he thought, perhaps, the engineer did and the fact as to what he, Morgan, did.

The running out of the slack and the sudden stopping of the cars causing decedent to be thrown therefrom could only be caused by the failure to cut off the four cars which the crew were attempting to shunt down the main track. The failure to cut off the four cars could only be caused by a failure of the coupler to function, when operated in the usual and ordinary manner, or by a failure of Morgan to operate the coupler in the usual and ordinary manner, which would require him to synchronize his movements and time the pulling of the pin with reference to his signals, the failure of which would be negligence. *C. R. I. & P.* v. *Ward*, 68 Okla. 201, 225 U. S. 18, 40 S. Ct. 275, 64 L. ed. 430.

The record indicates that Morgan had evidently reflected considerably upon the effect of his testimony and was endeavoring at all times to avoid the pitfalls of Count II of the petition while seeking to escape from those of Count I, so that his testimony finally simmered down to the failure of the coupler to function, when he attempted to operate it in the usual and ordinary manner (R. 63, 64, 65), and his pure supposition that the engineer had applied the brake without signal, thereby

causing the slack to run out and preventing him (Morgan) from pulling the pin (R. 63, 64, 71, 73), was refuted by the testimony of both W. I. Snowden (R. 175-6) and Frank Fast (R. 179) who were in charge of the engine and himself (R. 65, 71, 72, 73, 74).

Of course, petitioner could not recover upon Count II of the petition when the only testimony supporting that count was the mere supposition and the conclusion of Morgan, and even this disappears from the case when he testified that a Major coupling device was the only one he had ever found it necessary to use his foot to operate (R. 66); that he didn't know why the slack had run out (R. 71); that it possibly ran out before he got a chance to pull the pin (R. 72); that even if the engineer did shut the engine off before he pulled the pin that would not necessarily prevent him from pulling it and that the engineer never stopped (R. 72); that he did not know of the engineer doing anything that would cause the slack to run out of the train (R. 72, 73); that almost simultaneously with the giving of the signal he pulled the pin (R. 73); that he did not wait too long after giving the signal to pull the pin (R. 122), and finally that in his opinion he could not have operated the coupler with his hand even after the engineer had given him slack (R. 76).

It appears to petitioner that the evidence of the failure of the coupler to function is so overwhelming and the evidence of negligence so unsatisfactory and meager as to exclude any other hypothesis from the case.

Witness Morgan testified that he took hold of the lever and signalled the engineer to stop, and that there was no reason why the coupler should not have worked

unless the engineer had previously "possibly" applied the brake just enough to take the slack out (R. 63), which the engineer positively testified he did not do (R. 173, 178, 179), and Morgan testified the engineer did not stop without a signal (R. 73). Morgan testified he didn't know of the engineer doing anything that caused the slack to run out (R. 73). He testified he could not have uncoupled the cars the second time with his hand (R. 76). W. I. Snowden testified that they were shoving the cars back; that the slack don't run out when they start to roll back, but only when the engine stopped when the brakes were applied; that the slack would commence to run out when the engine commenced to stop (R. 177).

Frank Fast, the engineer, and W. I. Snowden, the fireman in charge of the engine, testified that the train and no part of it was permitted to roll back without a signal from Morgan; that an engineer never permits this to be done as it is dangerous and against the rules (R. 175, 179); that they started backing up the engine and shoved the cars back from two to four car lengths when he got a signal from Mr. Morgan to stop, whereupon, he applied the brakes (R. 179) and that the slack would not run out after he once started back until he got a signal to slow and applied his brakes (R. 181).

Respondents make the further startling statement that "there was no evidence whatever to support the charge that respondents had violated the Safety Appliance Act," and while it is not necessary that there be a visible defect in the coupler in order to hold the carrier liable, *A. C. R. Co.* v. *Parker*, 242 U. S. 56, 59, 37 S. Ct. 69, l. c. 70, 61 L. Ed. 150, nevertheless, the testimony of Morgan himself that he tried to operate the coupler two or three times and it wouldn't work (R.

66); that this was the only make of coupler he had found it necessary to use his foot in operating (R. 66); that if it is in proper working condition it can be uncoupled by hand (R. 67) and that on many other occasions he had found it necessary to use his foot to uncouple this particular kind of a coupler (R. 67) is ample evidence that there was something wrong with the coupler, and that he could not have operated it with his hands even after the engineer had given him the necessary slack (R. 76).

With regard to the testimony of Morgan concerning the movements of the drag and the effect thereof petitioner calls the court's attention to the fact that Morgan was 10 cars away from the engine and did not know what the engineer did. He was likewise four car lengths from the end of the car from which decedent fell and could not know what took place there and all the time his attention was directed toward the pulling of the pin. The testimony of the engineer and fireman to the effect that there was no slack, that there was no jerk or jar at the end of the drag, is equally mere conjecture and speculation because they were further removed from the cars which would be affected by the presence or absence of slack. A situation of this character existed in the case of *Gulf M. & N. Ry. Co.* v. *Wells,* 275 U. S. 455, 48 S. Ct. 151, 72 L. ed. 370, in which this court said, l. c. 152-3:

> "* * *, Wells' statement that the jerk was given by the engine, was, obviously, a mere conjecture, as he was then at the side of the caboose, ten car lengths away, where he could not see what occurred on the engine. And his opinion that the jerk was unusual and severe as compared with those which he had previously experienced on local freight trains, had no substantial weight; his situation on the ground by the side of the moving train, after his foot had

> turned on the piece of coal and he had gone 'down,' being plainly one in which he could not compare with any accuracy the jerk which he then felt with those he had experienced when riding on freight trains."

II.

No attempt whatever was made by the respondents to meet the issue presented by paragraphs 2 of the "Questions Presented" and "Reasons Relied on for the Allowance of the Writ," and the petitioner's second specification of error in her brief.

The Supreme Court of Oklahoma having held that, as a matter of law, the evidence presented by petitioner was wholly insufficient to sustain a judgment (R. 211), the question presented was whether or not there was sufficient evidence adduced by plaintiff to submit to the jury under proper instructions.

The respondents sidestep this issue and attempt to inject in the case a false issue by stating that petitioner's contention was "that there is no evidence to support the verdict of the jury and the judgment of the trial court and the Supreme Court of Oklahoma thereon" (Brief, p. 3). This question, of course, is not before the court at all and is beside the point. No question is being raised as to the sufficiency of the evidence to support a verdict for respondents. The only question before this court is whether or not there was sufficient evidence to support a verdict for petitioner and whether or not the case should have been submitted under proper instructions. We take it that if respondents had not produced any evidence to sustain the issues upon their part the court still could not have directed a verdict for the petitioner. Petitioner's evidence and the credibility thereof would still have been a jury question.

In order to avoid meeting this issue, discussing the evidence and the applicable law upon this point, and possibly to confuse the court as to the real issues involved, respondents have injected this false issue into the case and it should be disregarded.

III.

Respondents go to great length, pages 4, 5, 6 and 7 of their brief, where a written statement given by plaintiff's witness Robertson is quoted from and refers to the record pages where the testimony of witnesses McLaughlin, Wallace and Henderson are found, which was given in connection with the statement.

The purpose of respondents in thus quoting at length from this statement and referring to the testimony of said witnesses in this proceeding is not clear unless it be for the purpose of diverting attention from the real issues.

Under the laws of the State of Oklahoma this testimony can be used for impeachment purposes only and does not tend to establish the truth of the matters embraced within such contradictory statement as was held in the case of *Baker* v. *J. H. Hudson Drilling Co.*, 300 Pac. 386, l. c. 388, as follows, to-wit:

> "It is the rule that evidence of a prior statement of a witness who is not a party litigant, which is at variance with his testimony at the trial of a cause, only goes to his credibility, and does not tend to establish the truth of the matters embraced in the contradictory statement, and cannot be considered in determining the propriety of a demurrer to the evidence where the case is tried to a jury. * * *"

To the same effect is the case of *Evans* v. *Local Bldg. & Loan Assn.*, 36 Pac. (2d) 895 (Okla. Sup. Ct.). This is also the rule followed in this court. *Southern Ry. Co.* v. *Maggie Gray*, 241 U. S. 333, 36 S. Ct. 558, l. c. 560, 60 L. ed. 1030. Petitioner, therefore, assumes that such matter will be disregarded by the court.

IV.

Again in their discussion of the instructions respondents do not meet the issue. Their argument is beside the point. They take the position that the instructions must be considered together and that the giving of one or more instructions free from error will correct the erroneous instructions given the jury upon fundamental issues. This absurd position results from a poverty of logic and authority with which to argue the matter under discussion.

Respondents quote from page 17 of petitioner's brief to the effect that the case was triable under the local rules of practice and procedure of the State of Oklahoma and then say, brief page 11:

> "It is well settled by rules of practice and procedure and laws of Oklahoma that where a party fails to object to the instructions at the trial of a cause he thereby waives all error."

The above statement does not meet the issue presented by petitioner's Summary of Argument V. All of what was said was not quoted, nor is any comment made or any of the authorities submitted distinguishing the cases which petitioner cited as supporting her position that it was not necessary to save exceptions for a review of instructions which were fundamentally erroneous. Respondents again attempt to sidestep the real issue and

inject a false issue into the case. Respondents' contention that the instructions must be considered as a whole and are sufficient if they fairly submit the issues to the jury when considered in their entirety is not applicable here, and in connection with this argument it is significant that the Supreme Court of Oklahoma did not base its refusal to review the instructions upon the theory that no exceptions were saved to the giving of such instructions.

From a reading of the opinion in the Supreme Court in this regard (R. 210) one could not determine the character of instructions which were given and consequently it could not be determined from the opinion whether or not they were erroneous and this court will not permit a state court to evade the application of the Federal Employers' Liability and Safety Appliance Acts by a wrong analysis of the evidence, misconception of the law, and vague opinion. *Atlantic Coast Line R. Co.* v. *Mims*, 242 U. S. 532, 37 S. Ct. 188, l. c. 189, and the cases cited therein. The cause of action sought to be enforced herein was not recognized at common law. *St. Louis S. F. & Texas R. Co.* v. *Seal*, 229 U. S. 156, 33 S. Ct. 651, l. c. 652, and the cases cited therein. Whether or not the plaintiff has been deprived of a federal right is not to be based upon technical rules and a state court cannot by procedural means deprive a plaintiff or a defendant of the benefit of the Federal Employers' Liability or Safety Appliance Acts. This was held in the case of *Toledo, St. L. & W. R. Co.* v. *Slavin*, 236 U. S. 454, 35 S. Ct. 306, l. c. 307, in which the court said:

> "But a controlling Federal question was necessarily involved. For, when the plaintiff brought suit on the state statute, the defendant was entitled to

disprove liability under the Ohio act, by showing that the injury had been inflicted while Slavin was employed in interstate business. And, if without amendment, the case proceeded with the proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the Federal statute, it was error not to apply and enforce the provisions of that law.

"* * *. The principle of that decision and others like it is not based upon any technical rule of pleading, but is matter of substance, where, as in the present case, the terms of the two statutes differ in essential particulars. * * *"

It is, therefore, perfectly apparent that a state court by its instructions to the jury cannot deprive the petitioner of a Federal right, yet that is what has been done in this case, and in view of the statement referred to above in the brief of respondents, petitioner feels that it is necessary that the question of saving exceptions in order to render the giving of erroneous instructions reviewable must be further developed in order that the court fully understand petitioner's position.

Not only is it the law of the State of Oklahoma that plain or fundamental error will be reviewed without the saving of exceptions, but such is the general law. The rule is stated in 64 C. J. 957, as follows:

"* * * when the verdict of the jury has been made to turn upon an erroneous charge, and the judgment upon the merits is thus founded on error, the judgment will be reversed, although no exception was taken thereto.

Wyman v. *Erickson*, 28 N. W. 240, 35 Minn. 202; *Gowdey* v. *Robbins*, 38 N. Y. S. 280, 3 App. Div. 353, 3 N. Y. Ann. Cas. 231; *Wright* v. *Cincinnati St. R. Co.*, 9 Ohio Cir. Ct. 503, 6 Ohio Cir. Dec. 159 (aff.

43 N. E. 688, 54 Ohio St. 181, 32 L. R. A. 340); *Beazley* v. *Denson*, 40 Tex. 416; *Hollingsworth* v. *Holshousen*, 17 Tex. 41; *Wetmore* v. *Woodhouse*, 10 Tex. 33.

Erroneous instruction on burden of proof is ground for reversal, although not objected to. *Gowdey* v. *Robbins*, 38 N. Y. S. 280, 3 App. Div. 353, 3 N. Y. Ann. Cas. 231.

Where charge excludes material conclusions to be deduced from the evidence, it is reversible error, although no exceptions are taken thereto. *Stude* v. *Saunders*, 2 Tex. Unrep. Cas. 122."

In the case of *First National Bank of Mounds* v. *Cox*, 83 Okla. 1, the court gave two erroneous instructions which confused the issues in the case and to which no exceptions were saved, l. c. 3, but, nevertheless, the court reviewed the instructions given by the lower court and reversed and remanded the case because of the giving of the erroneous instructions and in doing so quoted with approval a portion of Sec. 53, page 270, 20 R. C. L. l. c. 6, as follows, to-wit:

" 'Omission or Refusal to Instruct. The failure of the trial court to submit to the jury such issues as are necessary to settle the material controversies, or to state the law applicable to a material issue, such as damages, is ground for a new trial.'

Section 54, page 271, 20 R. C. L., reads as follows:

'Objections and Exceptions. An instruction fundamentally wrong, or which has the effect of preventing a verdict for a substantial amount on a cause of action well pleaded and proven, may be assigned as error on a motion for a new trial, even though at the trial the attorney states that he has no exceptions to the charge, but it is otherwise with inaccuracies

> of expression, failure to instruct on every hypothesis, or inadequate treatment of some phase of the controversy. Under the statutes of some states instructions not excepted to, but which appear from the record to have been given or refused are open for consideration, on motion for a new trial.' "

And as its authority for reviewing the erroneous instruction and reversing and remanding the cause when no exceptions had been saved to the instructions at the time they were given, the court quoted from the case of *Snyder* v. *Stribling*, 18 Okla. 168, found at pages 200 to 207, l. c. 6, and this suit in reversing the case said, l. c. 6:

> " 'Appellate courts should see that causes are tried and justice administered according to the forms and requirements of the law and not hesitate to set aside the verdict of a jury or reverse the judgment of a court where there has been such a departure from settled forms or requirements as have apparently endangered and prejudiced the rights of any litigant.' "

In reversing and remanding the case this court said l. c. 6:

> "* * *. While the court, in his third instruction in the instant case, put the issue of menace up to the jury, and wherein he referred to his definition of duress or menace given in his fourth instruction, yet the giving of his instruction No. 5 on the issue raised by the pleadings, in addition to the instruction given on the same issue raised by the evidence, presented two inconsistent theories of law to the jury. To repeat, we hold this to be reversible error.
>
> We have examined the evidence in this case and we find that there is a probability that there was a miscarriage of justice in this case. The issues joined by the evidence in this case put a square issue of

menace to the jury. Both the plaintiff and defendant were entitled to an instruction plain and direct upon this question, with a definition of menace as laid down in the statutes, given either in the language of the statutes or giving the substance thereof. They were entitled to this without having any other issue injected into the case as was done in the instant case by giving of instruction No. 5. * * *."

It is the duty of the trial court to properly instruct the jury upon the decisive issues made by the pleadings and the evidence, *Williams* v. *Otis*, 155 Okla. 173, and this is the law even though the court should give an instruction offered by the complaining party and not excepted to. Such was held by the Supreme Court of Oklahoma in the case of *Younger* v. *Blanchard Hardware Co.*, 120 Okla 279.

In that case the defendant offered three erroneous instructions which the court gave and defendant afterwards complained of those same instructions and sought a reversal because of the error of the court in giving the same and the court in reversing and remanding the case said, l. c. 280-281:

"Plaintiffs contend that if these instructions are in conflict and there is error therein, it was brought about by the act and conduct of the defendants below, and as defendants saved no exceptions to instructions numbered 6, 7, and 8, but prevailed upon the court to give them, defendants are therefore in a very poor situation to complain of the same here.

We cannot accompany counsel along this line of reasoning. Instructions 6, 7, and 8 embodied counsel's conception of the law applicable to the facts in the case and if they were correct they should have been given; if erroneous, they should have been rejected, and it would be an unusual proceeding for counsel to have objected to the giving of instructions sub-

mitted by them. Counsel for defendants did not think instructions 2 and 5 correctly stated the law, and objected to the giving of the same and saved their exceptions. The same is true of counsel for plaintiffs as to instructions 6, 7 and 8, and counsel would be derelict in their duty to their client if they failed to request the court to submit the cause to the jury upon proper instructions.

* * *

The jury determines the facts from the evidence, but must follow the law as given to them by the court, as applying to the facts so found. They are not at liberty to consider one instruction to the exclusion of the balance, but must consider them as a whole. *Badger Oil Co.* v. *Clay,* 83 Okla. 25, 200 Pac. 433; *M. K. & T. Ry. Co.* v. *Lenahan,* 85 Okla. 290, 206 Pac. 233.

If, then, the jury must consider the instructions as a whole, it is axiomatic that, to enable them so to do, the instructions must be consistent and harmonious, for if they are inconsistent, inharmonious and irreconcilable, confusion results, and the greater the effort to reconcile the irreconcilable only results in greater confusion, and when this irreconcilability, inconsistency and confusion appear in the instructions, the judgment must be reversed for the reason that the court is unable to tell which the jury followed and which it ignored. *First National Bank* v. *Nolen,* 59 Okla. 20, 157 Pac. 754."

A reading of the cases cited on pages 11 and 12 of respondents' brief will show their utter inapplicability to the argument advanced as they do not concern fundamentally erroneous instructions. They concern special instructions and incomplete instructions, but not instructions which are fundamentally erroneous on their face as

are the instructions here complained of. In the case of *Mason* v. *McNeal,* .... Okla. ...., 100 Pac. (2d) 451, l. c. 452, 453, this court in dealing with a similar question of fundamental error in the giving of instructions erroneous on their face, said:

> "• • •. But where, as here, no exceptions are saved, the review will be confined to prejudicial error, erroneous statement of fundamental law, appearing upon the face of the instructions. See, also, *Williams* v. *Otis,* 155 Okl. 173, 8 P. (2d) 728."

The question of the necessity of saving an exception where an instruction is fundamentally erroneous, or the requesting of other instructions in such case, is again treated in the case of *Baumgart* v. *Bryant, et al.,* 184 Okl. 531, 88 P. (2d) 635, l. c. 637, 638, in which this court said:

> "• • • A party does not necessarily, in all cases, surrender the right to a review of an erroneous instruction because he has not requested a correct one. On this subject confusion sometimes occurs, and a partial review of some of our decisions will be of some benefit.
>
> "The rule concerning necessity of requests for instructions does *not apply to instructions as to the law applicable to the issues raised by the pleadings and the evidence.* Such has always been the rule in this state. It does apply to certain other instances *other* than the ones hereinafter enumerated. The distinction as to when the rule is applicable and when it is not is stated in *Dunnington* v. *Loeser,* 48 Okl. 636, 149 P. 1161, 150 P. 874, and reannounced in *Hopkins* v. *Stites,* 70 Okl. 177, 173 P. 449, 450, in this language: 'The petition also insists that, inasmuch as the defendant did not request a proper instruction, it is now too late to complain because one was not given.

But we understand the rule to be, if the instruction given is correct, and either party wants the law more fully stated upon the doctrine upon which the court is charging, then, before they can be heard to complain, they must request such instruction as they desire given. *But if the court undertakes to instruct the jury as to the law, and does so incorrectly, this is prejudicial error. Chicago, R. I. & P. R. Co.* v. *Baroni,* 32 Okl. 540, 122 P. 926; *St. Louis & S. F. R. Co.* v. *Crowell,* 33 Okl. 773, 127 P. 1063; *Robinson* v. *McIver, et al.* (Tex. Civ. App.), 23 S. W. 915."

"In that case the rule was announced in the third syllabus: 'If a court undertakes to instruct a jury as to the law and does so incorrectly, such error is not cured or waived by failure to request a proper instruction as to the law.'

"In *Mutual Refining Co.* v. *Union Refining Co.,* 124 Okl. 286, 255 P. 1015, it was held that: 'Whether requested or not, it is the duty of the trial court to state to the jury in its general instructions the law applicable to the issues raised by the pleadings and the evidence adduced upon the trial. Failure to do so constitutes reversible error. * * *.'

"A clear impression of the distinction is gained by comparing *St. Louis & S. F. R. Co.* v. *Crowell,* 33 Okl. 773, 127 P. 1063, 1064, with *Oklahoma Producing & Refining Corp.* v. *Freeman,* 88 Okl. 166, 212 P. 742, 745. In the first case mentioned it is said that '* * * where an instruction is correct *as far as it goes* but it is insisted that, under the facts in the case, additional instructions should have been given on plaintiff in error's theory, a reversal will not be had unless a supplemental instruction is requested embodying such theory,' but, using the language of the Oklahoma Producing & Refining Corp. case: 'Where the court undertakes to instruct a jury as to the law, and does so incorrectly, *such error is not cured or*

waived by the failure to request a proper instruction as to the law. Unquestionably, this is the correct rule if the erroneous instruction is such as is calculated to mislead the jury. * * *.'

"Time and again we have emphasized the foregoing. In *City of Tulsa* v. *Dickson, et al.,* 166 Okl. 206, 26 P. (2d) 920, 931, wherein it was held that the failure of the trial judge to instruct on the particular issues involved was prejudicial error notwithstanding the absence of a request therefor, we said: 'Neither of the parties to the action requested of the court an instruction upon the correct rule of law. We have cases holding that the failure of the appealing party to request correct instructions upon the material issues involved precludes him from complaining of the alleged error of the court in its instructions to the jury upon said issue. *Potts* v. *Zolinger,* 79 Okl. 262, 192 P. 1099. On the other hand, we have held that *the failure of the court to instruct the jury upon some material issue in the case is fundamental error. Jackson* v. *Peddycoart,* 98 Okl. 198, 224 P. 689; *Younger* v. *Blanchard Hardware Co.,* 120 Okl. 279, 251 P. 56; and *McMullen* v. *Holcombe,* 125 Okl. 178, 256 P. 888. There is a distinction between an incorrect instruction and the entire failure to instruct upon an issue.'

"There is no necessity of, nor any attempt at, laying down any all-inclusive rule in the present opinion. Probably among the cases other instances may be found, or other instances may later arise, where a request for an instruction may or may not be necessary in order to preserve ground for review, but, whatever may be said, it is clear from the foregoing authorities that such request is not necessary where (a) the court undertakes to instruct the jury as to the law, and does so incorrectly, or (b) where there is an entire failure to instruct upon a material issue made by the pleadings and the evidence." (Italics ours.)

Again, in the case of *Martin* v. *McCune,* 170 Okl. 196, 39 P. (2d) 978, this court said:

> "This court has many times emphatically announced the rule that it is the duty of the trial court to give upon its own motion a substantially correct and proper instruction as is applicable to the facts and issues joined."

In the case of *Beck* v. *Day,* 62 Pac. (2d) 1014, l. c. 1015, the Supreme Court of Oklahoma held:

> "Where exceptions are not saved to instructions given, this court will review such instructions only for the purpose of determining whether the same are free from fundamental error."

The duty of the trial court in the matter of giving instructions is further explained in *City of Altus* v. *Martin,* 94 Pac. (2d) 1, in which the Supreme Court of Oklahoma said, l. c. 3:

> "As contended by the City, there are a number of our decisions wherein we have said it is the mandatory duty of the trial judge to instruct correctly upon the fundamental issues of law involved upon his own motion. *First National Bank* v. *Cox,* 83 Okl. 1, 200 P. 238. See 64 C. J. 819, sec. 678 and cases under note 35. Our statutes enjoin such duty upon the trial judges. Sec. 359, O. S. 1931, 12 Okl St. Ann. Sec. 577(5). The authorities point out that it is the duty of the parties to submit instructions upon special pleas, defenses, etc."

See also the case of *Earl W. Baker & Co.* v. *City of Hollis,* 36 Pac. (2d) 757, l. c. 760, in which the Supreme Court of Oklahoma in enunciating the Oklahoma rule in regard to fundamental error, quoted from a number of cases as follows, to-wit:

> " 'It is the duty of the trial court, upon its own motion, to properly instruct upon the issues made by the pleadings and the evidence introduced at the trial of the cause, and a failure to do so constitutes fundamental error.' "

The question of the necessity of saving exceptions to the giving of instructions which are fundamentally erroneous was discussed in the case of *Liberty Nat. Bank of Weatherford* v. *Semkoff*, 84 Pac. (2d) 438, in which the Supreme Court of Oklahoma held, l. c. 440:

> "Since the plaintiff did not save exceptions to the instructions given as required by section 360, O. S. 1931, 12 Okl. St. Ann. Sec. 578, we are precluded from reviewing such instructions further than to ascertain whether they are free from fundamental error. *Beck* v. *Day*, 178 Okl. 310, 62 P. 2d 1014; *Pure Oil Co.* v. *Chisholm*, 181 Okl. 618, 75 P. 2d 464; *Jewel Tea Co.* v. *Ransdell*, 180 Okl. 203, 69 P. 2d 69; *Shobe* v. *Sykes*, 169 Okl. 491, 37 P. 2d 908; *Scott* v. *Scott*, 129 Okl. 176, 264 P. 159. We have therefore examined the instructions given by the court merely for the purpose of determining whether or not they are free from fundamental error, and we find that they fail to instruct the jury upon the decisive issues made by the pleadings and the evidence introduced at the trial and are in this respect fundamentally erroneous. See *Guarantee Investment Corp.* v. *Killian*, 180 Okl. 74, 67 P. 2d 939; *Williams* v. *Otis*, 155 Okl. 173, 8 P. 2d 728; *Oklahoma Producing & Refining Corp. of America* v. *Freeman*, 88 Okl. 166, 212 P. 742. On account of the errors above pointed out the cause must be reversed and remanded for a new trial."

This was followed and approved by the Supreme Court of Oklahoma in the case of *Riser, et al.* v. *Herr*, 102 Pac. (2d) 178, l. c. 180.

From the above and foregoing decisions it is clear that Instructions 8, 9, 12, 13, 14, 15, 16, 17, 18 and 21 are fundamentally erroneous. They submit a Federal Employers' Liability and Safety Appliance case under the common law and interpose the common law defenses of assumed risk and contributory negligence without any distinction. In fact, Instructions 12, 15 and 17, given by the court, impose a greater duty upon the decedent than did the common law he being charged with the duty of exercising care (whether slight, ordinary or extraordinary) to discover extraordinary hazards and dangers created by respondents.

We feel that we have demonstrated that in cases of this character it is not necessary to save exceptions at the trial to the instructions complained of and, of course, if it was not necessary, as we have shown, under the Oklahoma law to save exceptions in cases of fundamental error in order to have a review of the instructions, the petitioner could not be charged with any dereliction of duty in not saving them. As shown above, it is only in cases where an instruction is incomplete or where special instructions are requested that it is necessary to save exceptions in order to have the same reviewed.

The giving of erroneous instructions in connection with correct instructions was treated in the case of *Helsel* v. *Fletcher*, 98 Okla. 285, 225 Pac. 514, in which it quoted with approval from the case of *Payne* v. *Harvester Machine Co.*, 11 Okla. 318, 66 Pac. 287, as follows, to-wit:

> "'While it is a general rule that all of the instructions must be considered as a whole and construed together, and no particular one singled out to the exclusion of another, yet the instructions as

a whole must be consistent and harmonious, and where two instructions contain inconsistent propositions, the cause will be reversed, for the reason that the court is unable to tell which the jury followed and which they ignored.' "

And in the case of *Winn, et al.* v. *Corey,* 179 Okl. 305, 65 Pac. (2d) 522, l. c. 524, this court said:

"It is urged that the general instruction and instruction numbered 6 cured the error, if any, in instruction numbered 4. This same contention was made in *Pittsburg County R. Co.* v. *Hasty, supra,* but was denied. The error of the court in giving instruction numbered 4 was not cured by the general instruction or by giving instruction numbered 6. It does not appear that these instructions relieved defendants of the wrongful burden imposed by instruction numbered 4. Ordinarily erroneous instructions are not cured by the giving of a correct instruction is discussed *infra,* where the cases of *Helsel* v. *Fletcher, Winn, et al.* v. *Corey,* and *Younger* v. *Blanchard Hardware Company,* are cited as authorities."

It will, therefore, be seen that the giving of the abstract instructions Nos. 22, 23 and 24, referred to on page 9 of respondents' brief, does not cure the giving of the fundamentally erroneous instructions. In fact, the giving of abstract instructions, such as these, is condemned by the Supreme Court of Oklahoma, *Green Const. Co.* v. *Empire District Elec. Co.,* 218 Pac. 1074, l. c. 1075. *Miller Bros.* v. *McCall Co.,* 133 Pac. 183. *Miller* v. *Price,* 33 Pac. (2d) 625.

V.

In their discussion of the question of proximate cause respondents have again evaded the issue. The question

was not whether or not proximate cause was submitted to the jury. It is whether or not there was evidence of proximate cause sufficient to submit to the jury. The cases cited by petitioner are neither discussed or distinguished by respondents. As stated in our original petition, the question of proximate cause is ordinarily one for the jury and is seldom taken from the jury and it is, therefore, erroneously held by the Supreme Court of Oklahoma that there was no causal connection between the failure of the coupler to operate and the death of decedent when no intervening cause was shown.

Conclusion.

The brief of respondents does not meet a single issue presented by the petition for writ of certiorari and the brief in support thereof. The whole argument is evasive and not directed at the points raised. Petitioner has shown that it is fundamental error under the practice of Oklahoma for the court not to give of his own motion correct and proper instructions upon the issues made by the pleadings and the evidence, and that it is not necessary to save exceptions to the giving of such instructions.

A similar situation existed in the case of *C. & O. R. Co.* v. *John J. De Atley*, 241 U. S. 310, 36 S. Ct. 564, l. c. 566. In that case it appeared that there was an established rule of practice in Kentucky that if instructions were offered upon any issue respecting which the jury should be instructed and were incorrect in form or substance, it was the duty of the trial court to prepare or direct the preparation of proper instructions upon the point in the place of the defective ones. In this case the court said, l. c. 566:

"Although the present action was based upon a Federal statute, it was triable and tried in a state court; hence local rules of practice and procedure were applicable. *Central Vermont R. Co.* v. *White*, 238 U. S. 507, 511, 59 L. ed. 1433, 1436, 35 Sup. Ct. Rep. 865, 9 N.C.C.A. 265; *Minneapolis & St. L. R. Co.* v. *Bombolis*, No. 478, this day decided (241 U. S. 211, 60 L. ed. .., 36 Sup. Ct. Rep. 595). The Kentucky court of appeals assumed for the purposes of the decision that the case was one where the trial court ought to have followed the local practice and prepared or directed the preparation of a proper instruction covering the question of assumption of risk; and it sustained the judgment only upon the ground that there was no question for the jury respecting it. Whether there was is a question of law, and of course, in this case, a Federal question; and *since the court of appeals assumed to decide it, it is incumbent upon us to review the decision.* • • •" (Italics ours.)

The Supreme Court in this case decided that the instructions were not erroneous (210).

The instructions in the De Atley case cannot compare in viciousness with Instructions Nos. 12, 15 and 17, given herein upon the same question. The fact that decedent was not operating the coupler is covered in our original brief, page 45, and is immaterial. The statements on page 17 of respondents' brief that decedent Essary climbed on top of this cut of four cars after they were cut off the train; that he was not on top of them when Morgan pulled the pin; that the four cars had rolled a short distance before Essary got on top of them, is pure fabrication, there not being a scintilla of such evidence in the record, and we challenge respondents to give a single record page citation supporting any such

extravagant statements. In making such statements without the record page citations. respondents are violating paragraph 3 of Rule 27 of this court.

Respondents' comment that the amazing thing about the attack on the instructions is that out of all the instructions given at the trial petitioner excepted to only five. Of course, as petitioner has shown aforesaid, it was not necessary for her to except to instructions which were so plainly and fundamentally erroneous as were the ones in this case. The amazing thing about the case is that any court should have given instructions such as those in this case which these respondents pass by *sub silentio* without any attempt at discussion or the citation of authority in support of the giving of the same.

The statement on page 18 of respondents' brief that all phases of the Safety Appliance Act and Federal Employers' Liability Act were fully covered in the court's instructions and that when considered as a whole there was no error demonstrates the low esteem with which respondents must regard the intelligence of the court.

Respondents refer to the "bunglesome" manner in which decedent was dressed, but under the evidence of their own witness (R. 160) he was dressed in the usual and ordinary raiment of railroad men working under the same or similar circumstances and decedent's widow testified that for years he had dressed similarly for the performance of his duties in inclement weather (R. 124). The testimony of their own witness quoted on page 7 of their brief refutes their contention. In fact, the respondents think so little of this argument that when the court did not submit such facts to the jury for its considera-

tion upon the question of contributory negligence no instruction whatever was offered by the respondents submitting such facts (R. 198-200) and there was not a scintilla of evidence in the record that the manner in which decedent was dressed had a thing to do with him falling from the car and being killed.

Petitioner, therefore, respectfully submits that this court should issue its writ of certiorari to review the judgment of the Supreme Court of Oklahoma and the District Court of Custer County, Oklahoma, to determine whether or not petitioner has been deprived of a federal right under the acts referred to.

CLARENCE C. CHILCOTT,
Counsel for Petitioner